

## New powers for the Regulator: a better deal for the regulated?

During August 2009 the SRA hopes to be able to exercise new powers awarded to it under the Legal Services Act 2007 (the LSA) by way of amendments effected to the Solicitors Act, 1974 (the 1974 Act).

The SRA's powers have previously extended to dealing with matters internally or to refer to the Tribunal for a so-called external sanction. Internal sanctions are a reprimand or a severe reprimand. Other internal outcomes, which are not regarded as sanctions, are:

- No Further Action
- Expression of Regret
- Warning

In addition the SRA are now able to recover the costs of their investigations leading to internal sanction.

The powers of the Tribunal are:

- Reprimand
- Fine
- Suspension
- Striking off

Together with the power to order a party (almost always the respondent solicitor) to pay the SRA's costs. This power is now governed by a revised form of section 44C introduced by the LSA. The original costs levying power has been in force for some years.

The inability to impose a financial penalty has been a hindrance to the SRA when it has been dealing with solicitors. If a case merits more than a severe reprimand the only option for the regulator has been to refer to the Tribunal leading to much further delay, cost and what would appear to be a disproportionate treatment of the wrong-doer.

In an effort to address this issue the SRA are being given new powers under what is section 44D of the 1974 Act. These new powers should enable the Authority to deal with solicitors in a more proportionate and fair manner within a shorter timeframe than would otherwise have been the

case.

The new powers are in section 44D(2):

The Society may do one or both of the following:

- A. give the person a written rebuke;
- B. direct the person to pay a penalty not exceeding £2,000.

For the first time those receiving a sanction may appeal to the Tribunal if a Rebuke is to be published or if a fine is imposed (irrespective of publication), see section 44E.

It is probably also worth mentioning in this context the possibility of a Regulatory Settlement Agreement (RSA) as a way of mediating a solution to disciplinary investigations. In less serious cases the Authority may be prepared to consider a proposal to accept a particular sanction rather than pursue the matter before an Adjudicator. This can be worth considering if, as is usual, some breach has been committed and you wish to achieve certainty and an earlier disposal of the matter. Tactical considerations may enter however if the sanction sought by the Authority via a RSA is not one which would otherwise be published as RSAs are at present published.

Under sections 44BA and 44BB the opportunity has been taken to beef up the Authority's powers to require solicitors to provide documents (presently in section 44B of the 1974 Act) by also now requiring them to attend at a time and place specified by the SRA to provide explanations. A condition precedent is that a section 44B notice must have been served requiring the delivery up of documents.

The requirement may be satisfied by a representative of the person attending. In section 44BA(2) the SRA may pay the reasonable costs incurred by any person compliance with an attendance requirement. Whether "reasonable costs" would extend to include the costs of a person's legal representative remains to be seen.

In section 44BB the Authority now has similar powers to section 44B (document production) in relation to non-solicitors but only on obtaining a High Court order. Firstly they have to establish the possession of such documents by that non-solicitor and its material significance. This power could prove very useful in mortgage fraud cases where the solicitor may wish to argue that the Authority should seek documents from third parties to establish the solicitors' innocence. Although in our experience the Authority is usually slow to approach others for such information preferring to leave that task to the solicitor.

Section 44BC sets out so-called "Information Offences" which prescribe criminal sanctions if a person falsifies, conceals, destroys or otherwise disposes of a document which that person knows or suspects is or would be relevant to an investigation or causes or permits those events. Specific intent to commit the offences must be established.

Another offence is also created – of providing false or misleading information or recklessly doing so.

The maximum sentence is 2 years imprisonment or a fine or both.

How often will these new powers be used? It is difficult to say but there are figures available for RSAs. At the time of writing the latest figures are the March 2009 SRA "Summary of Performance Measures and Statistics". They state, for example, the SRA is dealing with cases in a more proportionate manner by making use of RSAs. However the same report shows (on page 9) that in the 12 months to March 2009 no RSAs were actually agreed. Our firm's experience is that case workers show a marked reluctance to proceed with the suggestion of RSAs. It is obviously early days but one would hope a more proportionate approach would begin to make an appearance.

If you are invited to enter into a RSA, seek advice. RSAs are published whereas most internal sanctions are not. A careful judgment needs to be made about whether a RSA or an internal sanction is the best option in your case.

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